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Supreme Court, U.S.
FILED
JUL 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

JOHN WILLIAM JOHNSTON, JR.,
JOHN MIKE RUSSELL,

Petitioners,

versus

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

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October Term, 1970

No. 1814

JOHN WILLIAM JOHNSTON, JR.,
JOHN MIKE RUSSELL,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, State of Georgia, respectfully shows:

STATEMENT OF THE CASE

Respondent adopts petitioners' statement of facts as correct, with the following exceptions and additions:

Carl Barker testified that he did "fully explain" to the magistrate the details of his investigation to de-

termine the reliability of the informer and to reveal facts as to how the informer reached his conclusions. (R-100). Some of the details were: (1) that the informer told Officer Barker that he had personally observed the narcotics (R-95, 104); (2) that the officers had checked different places and with different people to verify the truth of the informer's statements (R-94, 108); (3) that the officers determined from the motel register that the petitioners had checked into the motel some three days prior to the search (R-95); (4) that the informer knew the cars and the correct numbers of the rooms petitioners had rented (R-99, 106); (5) that the officers had personally conversed with Dr. Eberhardt and learned from him that the petitioners were examined by Dr. Eberhardt who was suspicious because of faked symptoms on the part of one of them, their request for strong pain-killing drugs, and because both of them gave the same name (R-95, 96, 97); (6) that Officer Barker had given the informer's name to the magistrate (R-103); and (7) that the informer had in fact described the narcotics. (R-104). Officer Barker also testified that he was in the magistrate's home close to one-half of an hour. (R-102).

Georgia Code Section 79A-819(1) (Georgia Laws 1967, page 296 et seq.) provides as follows: "no person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug: — by the use of a false name or the giving of a false address." Georgia Code Section 79A-708 provides as follows: "no person shall obtain or attempt to obtain any dangerous drug by use of a fictitious name or by the giving of a false address." Georgia Code Section 79A-802(14) provides that "'narcotic

drugs' means — opium —." Georgia Code Section 79A-802(12) defines opium as "morphine, codeine, and heroin — ." Georgia Code Section 79A-702 defines a dangerous drug as "anything which — may be dispensed only upon prescription." We urge the Court to take judicial notice that morphine, codeine and heroin are strong pain relievers, and we submit that officer Barker's interpretation of "real strong pain pills" as narcotics was well within the definition set forth in 79A-802. Obviously, these type drugs require a prescription. The affidavit thus shows that crimes were being committed in Dr. Eberhardt's office, and this information did not come from the informer (R-95, 96, 97).

Officer Barker *did not* agree that the informer's personal observation was not set forth in the affidavit. The conclusion referred to on page 9 of petitioners' brief obviously refers to the conclusion that the informer could have seen *what he said he saw* (R-105). The investigation to determine whether the informer did in fact see the narcotics as described by him could center only on accessibility, etc. and could only result in a conclusion from the facts gathered. In any event, Officer Barker is not the one to decide whether personal observation is noted in the affidavits.

Whether Officer Barker was sworn to all the facts recited to the magistrate is not clear, but the trial court could have found from the testimony that all the conversation was under oath (R-100, 103).

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT

The affidavit does state with sufficient clarity to put the magistrate on notice of how the informer obtained his information, and that the information is reliable.

The affidavit states "Officers also *determined* that this informer was in a position to have seen these narcotic drugs *as described by him.*" (Emphasis ours.) Thus personal knowledge on the part of the informer is before the magistrate. The informer had described how he had seen the drugs. We submit that there is no other logical or common-sense construction of the sentence. It is not a question of inferring personal knowledge. The sentence fulfills the two vital requirements of *Aguilar vs Texas*, 378 U.S. 108 (1964) and *Spinelli vs United States*, 393 U.S. 410 (1969). It explains the "underlying circumstances" of the informer's tip, and it establishes to some degree the informer's reliability. That the informer was in a position to have seen the narcotics bears on the informer's reliability and not the underlying circumstances. Webster defines "determine" as "to find out exactly; ascertain". Thus the magistrate knew that these officers based the reliability on facts discovered during investigation.

Respondent submits that it is readily apparent to any reader of this affidavit that the informer had personal knowledge of the existence of the narcotics. In addition to reading it in the affidavit he was informed by Officer Barker (R-95, 100, 104).

In *Ventresca v. U.S.*, 380 U.S. 102 (1965), the Court held that the appellate court should not overturn the exercise of discretion by the issuing magistrate by a hypertechnical construction. As stated in *Draper v. U.S.*, 358 U.S. 307 (1959) the Court is dealing with probabilities, factual and practical considerations of everyday life, on which reasonable and prudent men, not legal technicians, act. The magistrate could tell from the affidavit in this case that the tip was not based on casual rumor and that it was not an accusation based merely on an individual's reputation. As stated in *Spinelli*, supra, he "could reasonably infer that the informant had gained his information in a reliable way."

Here, there was an independent investigation to corroborate the informer, and the investigative efforts in this case are set forth in the affidavit. Officer Barker made sure the petitioners did have lodging in Rooms 217 and 219 as described by the informer, and that they were driving certain automobiles as described by the informer. Barker also determined that the petitioners did visit Dr. Eberhardt's office as the informer said they did, and learned additionally that Mike Russell had used a false name and address for the apparent purpose of obtaining real strong pain pills, known generally to be some form of narcotic. We submit that it is not important that petitioners did not obtain the drugs; they could have gotten them later the same day at some other place. What is important is that they were attempting to obtain some form of narcotic and their manner in so doing was criminal. The probability that these type people would have narcotics is greatly enhanced, and the informer's tip cor-

roborated to a great extent. Officer Barker then proceeded to check out the very heart of the informer's tip — that he had seen the narcotics. After an investigation involving other places and people the officers determined that the "informer easily could have been in a position" to see the items and that "the statements he gave us was checked out with the facts and found to be true." (R-94, 95, 100). Petitioners are critical that the investigative process is not further described in the affidavit. It is apparent that a further disclosure in this case would work an injustice. The State has the privilege to withhold from disclosure the identity of persons who furnish information to police officers concerning the commission of crimes. Although the privilege is not absolute on the issue of guilt or innocence, it does appear to be so on Fourth Amendment issues. In *McCray v. Illinois,* 386 U.S. 300 (1967) this Court seemingly recognizes the need in some cases to keep the informer's identity secret. There are apparently no decisions reflecting this Court's insistence on an application of the *Aguilar* and *Spinelli* tests regarding a detailed description of underlying circumstances when such description, in itself, identifies the informer.

Although the affidavit does not recite that the officers conversed with Dr. Eberhardt himself, it is clear that this was first-hand information obtained from police investigation. We again call the Court's attention to Webster's definition of the word "determine." There was a substantial basis for crediting this hearsay. Thus, the magistrate was aware from a reading of the affidavit itself that petitioners were in the doctor's office and had conducted themselves in a clandestine

and criminal manner. The officers would not have known of the visit itself had the informer not told them, and this would indicate to the magistrate the reliability of the informer — that he knew what he was talking about. Accordingly, respondent submits that there is here that "further support" that "would permit the suspicions engendered by the informant's reports to ripen into a judgment that a crime was probably being committed." *Spinelli,* supra.

Assuming that the informer's tip alone would not establish probable cause (even though the informer had seen the narcotics and had already been corroborated to a great extent), the unexpected and additional information gathered by the officers in Dr. Eberhardt's office while acting pursuant to that tip, would sustain the affidavit. *Whiteley vs Warden,* — U.S. — 28 L.Ed. 2d 306 (1971). Petitioners' conduct in the doctor's office is corroborative of the informer's tip that they were unlawfully possessing drugs. The *Whiteley* case does not hold that all facts constituting probable cause be set forth in the affidavit, but merely disclosed to the issuing magistrate.

The case of *Giordenello v. United States,* 357 U.S. 480, 486, (1958) cited by petitioners involves an arrest affidavit which states no facts at all, and has no bearing on these issues.

On the issue of whether the informer's tip was fresh or stale, we made the same argument before the Supreme Court of Georgia as is adopted in that Court's opinion. A common-sense reading of these affidavits makes it abundantly clear that petitioners probably

had illegal drugs in their motel rooms at the time of the issuance of the affidavits. In *Sgro vs United States*, 287 U.S. 206 (1932) referred to in petitioners' brief the United States Commissioner who issued the warrant took no proof to show that probable cause then existed and he made no finding of probable cause at the time. The wording of that opinion was tailored to those facts. There, the magistrate had no facts before him; here, there were numerous dates and facts all happening within a day or two of the issuance of the warrant, to enable the magistrate to make an independent and intelligent determination that the information was current.

CONCLUSION

Respondent respectfully urges that the petition for a Writ of Certiorari be denied as failing to warrant review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of July, 1971.